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Court : Allahabad

Decided On : Jan-31-1929

Reported in : AIR1929All267a

Appellant : Emperor

Respondent : Bashir

Judgement :

1. This is a reference made through the Sessions Judge of Saharanpur at the request of the District Magistrate of Saharanpur asking this Court to enhance the sentence of a fine of Rs. 50 or three months' rigorous imprisonment in default passed on Bashir, accused, on 10th October 1928, under Section 411, I.P.C. The accused was tried summarily. It is said to have transpired since, that the accused had been convicted on 21st May 1923, under Section 379, I.P.C., and bound over for six months under Section 562, Criminal P.C., and further convicted on 22nd December 1924, under Section 457/75, I P.C. and sentenced to 18 months' rigorous imprisonment and Rs. 50 fine or two months rigorous imprisonment in default.

2. Admittedly these two previous convictions were not brought to the notice of the trial Magistrate in any way whatever. It is admitted on behalf of the Crown that 'the investigating officer failed to mention them in his charge-sheet,' and further that 'no blame appears to attach to the Magistrate as he was unaware of the previous convictions.' It is no doubt in view of this last statement that, so far as our record

shows, the trial Magistrate was not asked to offer any explanation.

3. We have no hesitation whatever in saying that in a case where material was within the knowledge of the prosecution before the conclusion of the trial and was not brought, by the negligence of the prosecution, to the notice of the trial Court, we ought to refuse to interfere, and in this case we do refuse. To permit the prosecution to plead their own negligence and to harass the accused with further proceedings directed towards the enhancement of the sentence would simply be to put a premium on the exercise of negligence by the prosecution themselves.

4. But the matter does not end here. It is due to this application for enhancement that we have had to examine the record, and we are wholly dissatisfied with the manner in which the case has been conducted. In the first place it is manifest that a summary trial is intended to be directed towards offences which are appropriate for such form of trial. While it may be legal to use that procedure in a particular case, it does not follow that it is desirable. An offence which may seem very grave when regarded only from the point of view of the section applicable may really be, in the light of its particular circumstances, of a trivial nature On the other hand the consequences following upon conviction of what is in itself a trivial offence may be so grave as to render a summary trial unsuitable. From a conviction in this case another serious consequence was going to follow. The accused had been bound down on 3rd August 1928, under Section 109, Criminal P.C., in a personal bond of Rs. 100 with one surety of the like amount. We have no information in the brief record before us as to whether he had been bound down for one year or for three years. But the result is that if a conviction was arrived at in the present case the accused would not only have to suffer the sentence he might get in this particular case. Application would be made, as it has been made, to the trial Magistrate to take steps to see that the security bond was cancelled and the security forfeited. It appears, then, that at the time when this case was sent up by the police they knew that they were not only making a charge of theft, but they knew that the sentence should be very seriously enhanced owing to the previous convictions, and they knew that the consequences, which we have named, of the accused being under a bond were certain to follow. If these facts had all been brought to the attention of the Magistrate when he first took up the case, we think that he would probably

have exercised his discretion not to hear the case summarily, and we think that he should have so exercised it. It was clearly a case that required a full hearing and record.

5. Further the record, such record as we have of the case, shows that the accused may have been gravely prejudiced by the summary way in which his case was dealt with. If the case as it is now made for the Crown be accepted, this accused must have been released from jail some time in the middle of 1926. Two years later he is bound down on 3rd August 1928, under Section 109. He is then said to have been caught in the possession of stolen property, presumably some time shortly after 28th August 1928, that is to say, at any rate within a month of having been bound over. We cannot specify the date because while the judgment shows that the property was stolen on 28th August 1928, there is nothing on the record to show us on what date the search took place as a result of which the stolen property is said to have been found with the accused. The trial did not take place till 10th October 1928, i.e., some seven weeks later. The property stolen is said to have consisted of a large number of articles amounting in value to Rs. 122 and consisting of a number of coats, cloth, ornaments, etc. The complainant in his report of the theft said that he suspected three persons, Khedu, Mangalwa, and Bashir, presumably the present accused. His only reason for suspecting them was that he was on bad terms with them. We have no information whether the houses of the other two men were searched or not. The only article found in this man's house was one coat valued at Rs. 2. Owing to the fact that the trial was held in this summary way there is no evidence as to the search or the date on which it was held, or as to the place in which the coat was found.

6. In one sense this may be regarded as immaterial because the accused claimed the coat to be his own property. The coat is said to be identified as the property of the complainant by the complainant himself, a darzi, who swears that he made it and that it was the coat of the complainant, and a railway store-keeper, who says, according to the summary judgment, that this particular coat was given to the complainant by the railway, and that there was a railway identification mark on the coat, and that it was given to the complainant as part of his uniform. It is reasonable that such a store-keeper should be able to identify a coat as being of

the railway pattern and to identify the railway mark, but it is difficult to suppose (at any rate there is nothing on the record to support such a belief) that he could really identify the particular coat as having been issued to the particular man. However, that may be, that is all the evidence according to the Magistrate's summary that there was on behalf of the prosecution, and the Magistrate was possibly entitled to take it that the identity of the coat as the property of the complainant was established. The Magistrate remarks: 'The defence is too weak to rebut the evidence adduced by the prosecution.' We are unable to appreciate what he meant by this observation in view of the nature of the defence. The Magistrate says (we have his original judgment before us): 'Accused pleads guilty' (sic. He pleaded not guilty) and says he purchased it from one Bashir' (as Bashir is the name of the accused this is probably another mistake) 'for Rs. 2 and that the accused was annoyed with him in connexion of certain woman. This was the reason for his being implicated in the case. He produced one witness who

in a vague way says that the accused purchased a coat for Rs. 2 resembling that one shown to him in the Court. He doss not know the name of person from whom the coat was purchased.

7. It is clear that unless some dates are quoted to show that the accused was claiming to have purchased this coat at a date prior to the date on which it is alleged to have been stolen from the complainant, there is nothing whatever in the prosecution case to rebut the case for the accused. On the other hand, there is something actually to support the case for the accused. The accused says that he has been selected to be charged in this case because there is some trouble between him and the complainant about a woman. It is striking that the only reason given by the complainant for suspecting the accused is that he was on bad terms with him and two others.

8. Taking into consideration all these facts, and in a case where application is made for an enhancement we are called upon to look into the facts, we are satisfied that an enhancement should not be ordered by us, and we are not satisfied at all with the way the accused was tried or that he was rightly convicted. We, therefore, set aside the conviction and sentence and direct that the accused

be released, unless he is wanted upon any other charge. We frame our order in this way on the supposition that he may still be in jail. But even if he has unfortunately already had to serve his sentence under this conviction, he is still interested in having this right order in his case passed, for if the conviction be maintained and not sat aside merely on the ground that the sentence has been served, it would not only be an improper order to pass, but it would justify possibly the cancellation of the bond taken from the accused on 3rd August 1928. If any proceedings have been taken to cancel that bond and to send the accused to jail on the ground that he has committed a breach of that found as evidenced by the conviction we have just set aside, those proceedings for the cancellation of the bond will be set aside, and if the accused is in jail in consequence thereof he will be released and the bond will be restored to the operation which it had prior to this conviction.